

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC 2002-000529

03/31/2004

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED: _____

STATE OF ARIZONA

B DON TAYLOR

v.

LINDA LOU COHORST

JAMES N HANKEY

PHX CITY MUNICIPAL COURT
REMAND DESK-LCA-CCC

RECORD APPEAL RULE / REMAND

PHOENIX CITY COURT

Cit. No. #6030367

Charge: 1. DUI ALCOHOL
3. EXTREME DUI
5. IMPROPER POSITION FOR RIGHT TURN

DOB: 08/14/49

DOC: 04/09/01

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution, Article VI, Section 16, and A.R.S. Section 12-124(A).

This matter has been under advisement and I have considered and reviewed the record of the proceedings from the trial court, exhibits made of record and the memoranda submitted.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC 2002-000529

03/31/2004

Facts:

On June 21, 2002, Appellant, Linda Cohorst, was convicted of 2 DUI charges by a six person jury. Near the end of the trial, a juror asked the judge¹, “Prior to trial and now before deliberation, has every effort been made to reach a plea agreement?”² Appellant’s attorney moved for a mistrial, declaring that, “this juror’s actions [omitted] contaminated my client’s ability to get a fair trial out of this jury.”³ The court and parties agreed to designate the juror as an alternate. After the verdict was rendered by the other six jurors, the alternate juror (hereinafter “Alternate”), contacted the lower court concerning allegations of juror misconduct. The judge called Alternate in the presence of both attorneys.⁴ Alternate expressed concerns about pre-deliberation comments she overheard. The judge had Alternate come into the court and testify on record. Alternate testified that there were two comments that specifically caused her concern. The first was in response to a comment Alternate made concerning how lengthy the process was. The other juror allegedly replied that the deliberations were going too quickly. The other comment overheard by Alternate concerned a criminalist giving the prosecutor a “run for her money,”⁵ or that he was keeping the prosecutor “on her toes.”⁶ The judge ordered that both sides submit briefs regarding whether a new trial should be granted on the grounds of misconduct. Both sides submitted briefs and a hearing was held on September 26, 2002. The lower court judge denied Appellant’s motion for a new trial, finding no juror misconduct. Appellant now brings the matter before this court, having filed a timely Notice of Appeal.

Issue & Analysis:

The only issue before this court is whether the trial judge abused his discretion by denying Appellant’s motion for a new trial, considering the alleged comments made by Alternate juror and her fellow jurors. Appellant argues that said statements constitute juror misconduct, thus warranting a new trial. A new trial, on the grounds of juror misconduct, may be granted for the following reasons:

- (3) A juror or jurors have been guilty of misconduct by:
 - (i) Receiving evidence not properly admitted during the trial or the aggravation or penalty hearing;
 - (ii) Deciding the verdict by lot;
 - (iii) Perjuring himself or herself or willfully failing to respond fully to a direct question posed during the voir dire examination;

¹ Via note to bailiff.

² Transcript, p. 171, ll. 6-8.

³ *Id.*, p. 172, ll. 20-22.

⁴ Via speakerphone in the judge’s office.

⁵ Transcript, p. 234, ll. 2-8.

⁶ *Id.*

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC 2002-000529

03/31/2004

- (iv) Receiving a bribe or pledging his or her vote in any other way;
- (v) Becoming intoxicated during the course of the deliberations; or
- (vi) Conversing before the verdict with any interested party about the outcome of the case.⁷

The legislative comments found in Rule 24.1(c)(3) of the Arizona Rules of Criminal Procedure shed useful light on the statute's interpretation:

Rule 24.1(c). This section condenses the 11 grounds for new trial set forth in the 1956 Rules of Criminal Procedure, Rules 310 and 311, into 5: a verdict against the law or the weight of the evidence, misconduct of the prosecutor, misconduct of the jury, a mistaken ruling by the court, or any other error which prejudices a defendant at trial and is not his own fault. The "harmless error" rule is applicable to all. See Ariz.Const. Art. 6, § 27 (Supp.1972).

The first, second, fourth and fifth paragraphs of Rule 24.1(c) parallel provisions of the former rules and make no major change in the law. The third paragraph, relating to jury misconduct, is significantly different. Arizona Rules of Criminal Procedure, Rule 311(A)(4) stated only that "jury mis-conduct" was grounds for a new trial. **Paragraph (3) lists 6 explicit types of jury misconduct and is intended to be construed to exclude all others.** The greater specificity of this rule is necessitated by Rule 24.1(d), which allows much more liberal use of juror testimony to impeach a verdict than was formerly permitted. Since that section is not intended to permit a full scale judicial investigation of jury deliberations in every case, the operational definition of juror misconduct is restricted to the six blatant forms enumerated in Rule 24.1(c)(3).

I find that the comments made and overheard by Alternate do not constitute any type of juror misconduct proscribed by Rule 24.1(c)(3). The comments are clearly harmless and do not amount to a conversation about the "outcome" of the case. In *State v. Hooper*⁸, the court found no prejudice warranting a new trial where two dismissed alternate jurors met with two remaining jurors before deliberations. Not even comments by jurors *pressuring* other jurors to vote a particular way will serve as a basis for impeaching the verdict.⁹ Therefore, the judge's denial of

⁷ Rule 24.1(c)(3) - Arizona Rules of Criminal Procedure.

⁸ 145 Ariz. 538, 548, 703 P.2d 482, 492 (1985).

⁹ *State v. Cipriano*, 24 Ariz.App. 478, 480, 539 P.2d 952, 954 (App. 1975).

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC 2002-000529

03/31/2004

Appellant's motion for mistrial and motions for a new trial was proper and securely within the discretion of the trial court. In a court of law, a multitude of human factors comes into play, and "perfection is unattainable and neither the defendant nor the State is entitled to a perfect trial."¹⁰ In considering a motion for a new trial after a criminal conviction, the object is to promote justice and to protect the innocent, and the court's power is significantly broader than it is when considering a motion for a judgment of acquittal.¹¹ Justice will be served by allowing the judicial process to proceed without a new trial. It must be noted that motions for a new trial "are not looked upon with favor and are to be granted with great caution"; trial by jury is one of the most treasured guarantees of the Bill of Rights, and any interference with a jury's province must be exercised punctiliously.¹²

Finally, Appellant alludes to the trial judge's reading of Alternate's notes after trial's end, and asserts that this is action is highly improper. However, Appellant cites no statute or case law to support the claim. When questioned about reading Alternate's notes, the judge responded:

I didn't read through her notes. I just kind of very quickly went through them to see whether or not there were any questions here for the judge...I have not read through any of the juror's notes.¹³

Even if the judge had read Alternate's notes after the verdict, or if another juror had read the Alternate's notes *during* the trial, Appellant is not entitled to a new trial unless she can demonstrate actual prejudice.¹⁴ Appellant has failed to show any actual prejudice. Under these circumstances, I conclude that the trial court did not abuse its discretion by denying Appellant a new trial.

Conclusion:

A grant or denial of a new trial is within the sound discretion of a trial court, and will not be disturbed on appeal "unless an abuse of discretion affirmatively appears."¹⁵ I find no abuse of discretion on the part of the trial judge in this case, who acted promptly and responsibly to the allegations of juror misconduct.

¹⁰ *State v. Reynolds*, 11 Ariz.App. 532, 535, 466 P.2d 405, 408 (App. 1970).

¹¹ *State v. Clifton*, 134 Ariz. 345, 656 P.2d 634 (App. 1982).

¹² *Id.* at 349, 656 P.2d at 638.

¹³ Transcript, p. 218, l. 13 through p. 219, l. 7.

¹⁴ *State v. Spears*, 184 Ariz. 277, 289, 908 P.2d 1062, 1074 (1996).

¹⁵ *State v. Hickie*, 133 Ariz. 234, 238, 650 P.2d 1216, 1220 (1982).

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC 2002-000529

03/31/2004

IT IS THEREFORE ORDERED affirming the decision of the Phoenix City Municipal Court.

IT IS THEREFORE ORDERED affirming the findings of guilt and sentences imposed by the Phoenix City Municipal Court.

IT IS FURTHER ORDERED remanding this matter back to the Phoenix City Municipal Court for all further, if any, and future proceedings.

/ s / HONORABLE MICHAEL D. JONES

JUDICIAL OFFICER OF THE SUPERIOR COURT